

SUPREME COURT OF WISCONSIN

Case No.: 95-0314-CR

Complete Title
of Case:

State of Wisconsin,
Plaintiff-Respondent,
v.
Larry R. Dowe,
Defendant-Appellant-Petitioner,

REVIEW OF A DECISION OF THE COURT OF APPEALS
Reported at: 197 Wis. 2d 848, 541 N.W.2d 218
(Ct. App. 1995)
PUBLISHED

Opinion Filed: January 24, 1997
Submitted on Briefs:
Oral Argument: September 10, 1996

Source of APPEAL
COURT: Circuit
COUNTY: Waukesha
JUDGE: Marianne E. Becker

JUSTICES:
Concurred:
Dissented:
Not Participating:

ATTORNEYS: For the defendant-appellant-petitioner there were
briefs and oral argument by *Bryan J. Borman*, assistant state public
defender.

For the plaintiff-respondent the cause was argued by *Stephen
W. Kleinmaier*, assistant attorney general, with whom on the brief
was *James E. Doyle*, attorney general.

Amicus curiae brief was filed by *Robert R. Henak* and *Shellow,
Shellow & Glynn, S.C.*, Milwaukee for the Wisconsin Association of
Criminal Defense Lawyers.

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

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STATE OF WISCONSIN

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IN SUPREME COURT

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FILED

JAN 24, 1997

Marilyn L. Graves
Clerk of Supreme Court
Madison, WI

REVIEW of a decision of the Court of Appeals. *Reversed and cause remanded.*

¶1 ANN WALSH BRADLEY, J. This case is before the court on a petition for review filed by the defendant, Larry R. Dowe. The defendant seeks review of a court of appeals' decision¹ affirming a non-final order of the circuit court for Waukesha County, Marianne E. Becker, Judge, denying his motion to dismiss.

The defendant argues that because possession of marijuana with intent to deliver² is a lesser-included offense of being a dealer in possession of marijuana without a tax stamp,³ the State's act of charging him with both offenses constitutes double jeopardy.

¶2 In State v. Hall, No. 94-2848-CR (S. Ct. Jan. 24, 1997), this court held that the drug tax stamp statute is unconstitutional. Thus, we do not reach the double jeopardy

¹ State v. Dowe, 197 Wis. 2d 848, 541 N.W.2d 218 (1995)

² Wis. Stat. § 161.41(1m)(h)1 (1991-92).

³ Wis. Stat. § 139.95(2) (1991-92).

issue presented in this case, because the defendant cannot be prosecuted for being a dealer in possession of marijuana without a tax stamp. Instead, we reverse and remand to the circuit court for further proceedings on the charge of possession of marijuana with intent to deliver and with directions to dismiss with prejudice the drug tax stamp charge.

By the Court.—Reversed and cause remanded with directions.